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No. ____

In the Supreme Court of the United States

OCTOBER TERM, 1993

HON. EDWARD R. KORMAN, UNITED STATES DISTRICT JUDGE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Title III of the Omnibus Crime Control and Safe Streets Act of 1968 specifies that orders authorizing electronic surveillance may be sought by the government from "a judge of a United States district court or a United States court of appeals." The 1976 amendments to the Magistrates Act provide that "notwithstanding any provision of law to the contrary * * * a judge may designate a magistrate to hear and determine any pretrial matter pending before the court * * *." The Magistrates Act also permits a judge to delegate to a magistrate judge "such additional duties as are not inconsistent with the Constitution and laws of the United States." The following question is presented:

> Whether a federal district judge may delegate to a magistrate judge the task of reviewing the government's application under Title III for an order authorizing electronic surveillance.

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PETITION FOR A WRIT OF CERTIORARI

The Honorable Edward R. Korman, United States District Judge for the Eastern District of New York, respectfully petitions for a writ of certiorari to review the judgment

of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-28a) is reported at 10 F.3d 931. The order of the court of appeals denying rehearing or rehearing in banc (App., *infra*, 49a) is unreported. The opinion of the district court (App., *infra*, 29a-48a) is reported at 784 F. Supp. 1019.

JURISDICTION

The decision of the court of appeals was issued on November 23, 1993. A timely petition for rehearing and suggestion of rehearing in banc was denied on February 15, 1994. The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant portions of Title III of the Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, 82 Stat. 112; the Magistrates Act of 1968, Pub. L. No. 90-578, 82 Stat. 1107, as amended; and the Electronic Communications Privacy Act of 1986, Pub. L. No. 99-508, 100 Stat. 1848, are reproduced at pages 52a-54a of the Appendix, *infra*.

STATEMENT

In our federal system, the adjudication of cases is a task that may be performed only by life-tenured Article III judges. Unfortunately, the almost ceaseless tide of new federal cases has imposed serious strains on the capacities of the federal judiciary and has led to the appointment of ever more judges to perform the tasks assigned to that judiciary. On the other hand, there are many significant and useful functions that the Constitution allows other judicial officers, such as federal magistrate judges, to perform. The ability of such officers to relieve Article III judges of numerous significant and time-

consuming but lawfully delegable functions has played an increasingly important role in recent years in enabling the federal judiciary to limit its size and still keep its head above water as the tide of litigation continues to sweep in.

One of the traditional judicial but non-adjudicatory functions that the Constitution contemplates may be performed by an official such as the magistrate judge is the issuance of search warrants. While the regulation of governmental intrusions into personal privacy is an undeniably important function of the Judicial Branch, the Fourth Amendment recognizes that the independence and detachment that are the paramount requisites for the reasonable exercise of this power can be found in federal magistrates.

Of all the non-adjudicatory functions federal judges are called upon to perform, few are more time-consuming – or better suited to the skills, training, and experience of federal magistrate judges – than the review of Title III applications for authorization to conduct electronic surveillance. That is what led petitioner, United States District Judge Edward R. Korman, to enter the order at issue in this case, delegating to a federal magistrate judge the task of reviewing, approving, and overseeing the administration of Title III electronic surveillances.

Judge Korman's action represented an important experiment in the use of magistrates to conserve scarce judicial resources. Nevertheless, a divided panel of the Second Circuit vetoed this proposed delegation because of its supposed inconsistency with Title III itself. As the court recognized (App., *infra*, 3a), the question is of great practical importance to the administration of justice in the federal courts. Unfortunately, the court's prohibition of Judge Korman's initiative unjustifiably interferes with a legitimate effort to eliminate a burdensome, non-adjudicatory function from the heavy judicial workload, unduly constricting judicial delegation powers under the Magistrates Act. Moreover, the

court's statutory analysis is seriously flawed and in conflict with decisions of this Court.

Because the Second Circuit's decision turns on the relationships among several statutes, we briefly set forth the statutory background and before describing the opinions below.

A. Statutory Background

1. *Title III.* In Title III of the Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, 82 Stat. 112, codified as amended at 18 U.S.C. §§ 2510-21 (1988), Congress created a procedure by which the government may obtain authority to intercept wire and oral communications. The purpose of Congress in enacting this legislation was twofold: it wanted to protect the privacy of communications, while giving law enforcement officials the ability, consistent with constitutional standards, to tap telephone lines and use other forms of electronic surveillance in the investigation of major crimes. See S. Rep. No. 1097, 90th Cong., 2d Sess. (1968), reprinted in 1968 U.S.C.C.A.N. 2112, 2153.

Under 18 U.S.C. § 2516(1), the government may apply to a "Federal judge of competent jurisdiction" for an order authorizing or approving the interception of wire or oral communications. "Judge of competent jurisdiction" is defined in Title III as "a judge of the United States district court or a United States court of appeals." *Id.* § 2510(9). The legislative history makes clear that Congress limited the power to issue electronic surveillance orders to federal judges because of concern over the abilities of some of the officials, especially United States Commissioners, who were authorized to issue conventional search warrants:

> Existing Federal search warrant practice permits U.S. Commissioners and city mayors to issue warrants (18 U.S.C. 3041 (1964)). This practice is too permissive for the interception of wire or oral communications. Only

> judges of Federal district courts or courts of appeal should issue Federal warrants.

1968 U.S.S.C.A.N. at 2179.

2. *The Magistrates Act.* About three months after it passed Title III, Congress enacted the Federal Magistrates Act of 1968, Pub. L. No. 90-578, 82 Stat. 1107, codified as amended at 18 U.S.C. §§ 3401-3402, 28 U.S.C. §§ 631-639 (1988 & Supp. IV 1992). This statute abolished the office of United States Commissioner and replaced it with a judicial officer, the United States Magistrate, serving directly below the level of the district judge. Responding to concerns about commissioners' lack of legal expertise and part-time status, Congress imposed qualifications designed to ensure that magistrates (later renamed magistrate judges) were competent, professional, and impartial. 28 U.S.C. § 631. In particular, Congress specified that magistrates must be attorneys and must not hold any other office during their tenure, and it provided for selection of magistrates pursuant to a merit system. *Id.* §§ 631(b)(1), (b)(5), (c).

Congress also gave magistrates dramatically greater powers and responsibilities than commissioners had possessed. Magistrates were authorized to try minor offenses with the parties' consent and were empowered to perform such additional duties assigned by the district court as are "not inconsistent with the Constitution and laws of the United States." 82 Stat. 1113. Among the nonexhaustive list of "additional duties" prescribed by this section were service as a special master in a civil action, "assistance to a district judge in the conduct of pretrial or discovery proceedings in civil or criminal actions," and preliminary review of post-trial motions in criminal cases. *Ibid.*

In 1976, unhappy with a series of cases in which courts had construed narrowly the "additional duties" a magistrates could perform, Congress overhauled Section 636(b). The House Report noted that the purpose of the Magistrates Act

had been to "create[] a system of full-time and part-time judicial officers who would perform various judicial duties under the supervision of the district courts in order to assist the judges of these courts in handling an ever-increasing caseload." H.R. Rep. No. 1609, 94th Cong., 2nd Sess. 5 (1976) ("*1976 House Report*"), reprinted in 1976 U.S.C.C.A.N. 6162, 6164. The Report went on to emphasize "the Congressional intention that the magistrate should be a judicial officer who, not only in his own right but also under the general supervision of the court, shall serve as an officer of the court * * * in the preliminary or pretrial processing of both criminal and civil cases * * * when assigned to the magistrate by a judge of the court." *Id.* at 6165.

To effectuate this broad role for magistrates, Congress amended Section 636(b)(1)(A) to provide that "[n]otwithstanding any provision of law to the contrary * * * a judge may designate a magistrate to hear and determine any pretrial matter pending before the court," except for eight enumerated matters not pertinent here. The House Judiciary Committee explained that the "notwithstanding" clause was "intended to overcome any problem which may be caused by the fact that scattered throughout the code are statutes which refer to 'the judge' or 'the court'." *1976 House Report* 9. In language that is especially pertinent here, the Committee stated, "[i]t is * * * intended that the permissible assignment of additional duties to a magistrate shall be governed by the revised section 636(b), 'notwithstanding any provision of law' referring to 'judge' or 'court'." *Ibid.* As for the pretrial matters magistrates were expected to hear and determine, the Committee made clear that the scope was to be extremely broad and limited only by the enumerated exceptions. See *Ibid.* ("the revised law * * * will clarify the broad authority to refer 'any pretrial matter'"); *id.* at 10 ("the revision * * * makes it clear that Congress intends that the magistrate shall have the power

to make a determination of any pretrial matter (except the enumerated dispositive motions)").

Congress did not disturb the "additional duties" clause, which provides that "a magistrate may be assigned such additional duties as are not inconsistent with the Constitution and the laws of the United States." 28 U.S.C. § 636(b)(3). The Committee viewed this residuary clause as an extremely broad grant of power to district judges to delegate their functions: "Under this subsection, the district courts would remain free to experiment in the assignment of other duties to magistrates which may not necessarily be included in the broad category of 'pretrial matters.'" *1976 House Report* 12. The Committee indicated its expectation that district judges would take advantage of magistrates' services, resulting in "increased time available to judges for the careful and unhurried performance of their vital and traditional adjudicatory duties, and a consequent benefit to both efficiency and the quality of justice in the Federal court." *Ibid.*

B. Judge Korman's Order

1. On February 14, 1992, while Judge Korman was assigned to review applications for Title III electronic surveillance orders, he issued an order in which he announced that he would henceforth refer all such applications to United States magistrate judges. In an extensive memorandum opinion, Judge Korman explained his reasons for concluding that he had and should exercise the power to make such a delegation. *In re Applications of United States Attorney for Orders Pursuant to Title III of the Omnibus Crime Control and Safe Streets Act of 1968*, 784 F. Supp. 1019 (E.D.N.Y.) (App., *infra*, 29a-48a).

Judge Korman was moved to take this action by the significant burden that review of Title III applications places on district judges. The applications are "long and prolix," often running into the hundreds of pages, and the judge must monitor the progress of the surveillance and review "equally

lengthy and prolix renewal applications" that are submitted when it is necessary to continue the surveillance after the expiration of the initial period of authorization. App., *infra*, 45a-46a. Because conscientious discharge of the authorization function is extremely time-consuming and can significantly burden the thoughtful and effective discharge of the federal judge's adjudicatory function, delegation of the function could improve both the quality and the speed of adjudications.

In finding that he possessed the power to delegate this task to a magistrate judge, Judge Korman relied primarily on the text and legislative history of the 1976 amendments to the Magistrates Act. He first noted that the amendments grew out of Congress's concern that certain judicial decisions had unduly limited the functions of magistrates under the 1968 statute by construing narrowly the "additional duties" (apart from specifically enumerated duties) they could perform. App., *infra*, 30a-31a. In Judge Korman's view, the 1976 amendments provided two separate sources of authority to refer Title III applications to magistrates: the "pretrial matters" clause (Section 636(b)(1)(A)) or the "additional duties" clause (Section 636(b)(3)).

Judge Korman observed that the principal objection to delegation derives from Title III's textual limitation of the judicial officers who could issue wiretap orders. But, he noted, the unambiguous language of the "pretrial matters" provision of the 1976 amendments expressly provided that such restrictions in existing statutes were no longer operative, because the power of delegation thereby recognized in the Magistrates Act applied "notwithstanding any provision of law to the contrary." App., *infra*, 31a-33a. Moreover, the concerns that motivated the restriction in Title III had been obviated by the fact that, unlike the commissioners they replaced, magistrate judges are well trained and highly competent legal professionals who "enjoy tenure, compensation and independence comparable to that of many state

judges who today issue orders pursuant to Title III." *Id.* at 38a.

In addition, Judge Korman concluded that the nature of the duties imposed on the judicial officer considering a Title III application and overseeing the execution of any surveillance that is authorized closely parallels the responsibilities entailed in passing upon conventional search warrant applications. This "makes it a particularly appropriate duty to assign to United States magistrate judges." App., *infra*, 45a. While Judge Korman recognized that electronic eavesdropping is potentially more invasive of privacy than many ordinary searches and seizures, he deemed it "unlikely that Congress intended that the same judicial officer it found competent to issue a warrant to arrest a person, to ransack his house, and seize his most private papers, [should] be denied the authority to entertain a motion for electronic eavesdropping upon the referral of a district court judge." *Id.* at 41a.

C. The Decision of the Court of Appeals

Judge Korman's action represented an important experiment in the use of magistrates to conserve scarce judicial resources. Nevertheless, the United States Attorney for the Eastern District of New York – perhaps concerned about the risk of suppression of evidence in a future criminal prosecution should it turn out that Judge Korman's delegation ruling was in error – sought an extraordinary writ, pursuant to 28 U.S.C. § 1651, to prohibit Judge Korman from delegating the application that was then pending before him. After directing Judge Korman to respond to the government's petition, the court of appeals dismissed the petition because no application was pending before Judge Korman at the time it acted.

Subsequently, another the Title III application (the one underlying this case) was presented to Judge Korman, who again ordered it referred to a magistrate. Rather than present the application to the magistrate, the government renewed its petition to the court of appeals for an extraordinary writ.

This time the court, recognizing that the question is one of great practical importance to the administration of justice in the federal courts (App., *infra*, 3a), addressed the merits and, by a divided vote, granted the government's petition.[1]

While acknowledging that the arguments in support of Judge Korman's reliance on the "pretrial matters" provision of the 1976 amendments and its "notwithstanding" clause were "substantial" (App., *infra*, 10a), the majority nevertheless rejected them on two grounds. First, it relied on the importance of the privacy interests implicated by electronic surveillance, which had led the Congress that enacted Title III in 1968 to limit approval authority for federal wiretaps to judges. In the majority's view, Title III was

> sui generis and * * * any Congressional expansion of the list of those officers authorized to approve wiretaps would be specific rather than general and indirect.

App., *infra*, 10a. It accordingly distinguished the case at hand from others in which the broad power of district courts to delegate to magistrates such pretrial matters as the empaneling of grand juries and such additional duties as the conduct of extradition proceedings had been upheld. *Id.* at 11a, 13a.

Second, the majority relied on the interaction between Title III and the Electronic Communications Privacy Act of 1986, Pub. L. No. 99-508, 100 Stat. 1848, codified as amended at 18 U.S.C. §§ 3121-3127 ("Privacy Act"). In the Privacy Act, Congress amended Title III to require law enforcement officers to obtain judicial authorization from a "court of competent jurisdiction" before employing pen regis-

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[1] Although the application that was the subject of the latest delegation order has not been re-presented to Judge Korman and may now be moot, this case is not. The Second Circuit's mandate orders Judge Korman, not only with respect to that application but generally, not to "delegate review of Title III applications to federal magistrate judges" in the future. App., *infra*, 50a-51a.

ters or trap-and-trace devices. 18 U.S.C. § 3122(a). The term "court of competent jurisdiction" was explicitly defined to include federal magistrate judges in the list of judicial officers authorized to review pen register applications. The majority attached great weight to the fact that, in enacting the Privacy Act, Congress "failed to amend Title III specifically to authorize magistrates to approve wiretapping orders." App., *infra*, 8a. Apparently treating this as a form of post-enactment legislative history for the 1976 amendments, the majority concluded that, by failing to amend Section 2510(9) of Title III to deal explicitly with wiretap authorizations by magistrates, Congress manifested an intent to continue restricting wiretap applications to judges. *Id.* at 10a-11a.

Finally, the majority saw a parallel between this case and *United States* v. *Giordano*, 426 U.S. 505 (1974), in which this Court held that the Attorney General could not delegate the power to authorize applications for Title III surveillance orders to his Executive Assistant despite a pre-existing general statute (28 U.S.C. § 510) giving broad powers of delegation to the Attorney General. The majority found *Giordano*'s strict construction of Title III instructive in the context of judicial delegation of authority to magistrate judges (App., *infra*, 11a-13a), even though, unlike the general delegation statute there at issue, the 1976 amendments both post-dated the enactment of Title III and expressly authorized delegation of pretrial matters "notwithstanding any provision of law to the contrary." 28 U.S.C. § 636 (b)(1)(A).

Judge Cardamone dissented. App., *infra*, 15a-28a. He did not deny the importance of the privacy interests at stake in electronic surveillance or the intent of Congress in adopting Title III to afford due protection to those interests, but he found those insufficient reasons to disregard the clear statutory directive contained in the 1976 amendments. Judge Cardamone first pointed out that Title III could not have mentioned magistrates because such an office did not exist

until later in 1968 when Congress passed the Magistrates Act. *Id.* at 16a.

Judge Cardamone stressed that Congress made clear in 1976 just how extensive it wanted the powers of magistrates to be. Against a background of deep concern over the restrictions placed on magistrates between 1968 and 1976, Congress used two particularly expansive phrases in the 1976 Amendments, authorizing judges to delegate to magistrates "any pretrial matter" and "such additional duties as are not inconsistent with the Constitution and laws of the United States." 28 U.S.C. §§ 636(b)(1)(A), (b)(3). App., *infra*, 17a-18a. "Of equal importance" was the amended statute's introductory phrase, which made its provisions applicable "notwithstanding any provision of law to the contrary." Judge Cardamone read the legislative history to make plain that Congress intended the "notwithstanding" clause to modify all references throughout the U.S. Code to the authority of "the judge" or "the court." *Id.* at 18a.

Judge Cardamone concluded that referral of Title III wiretap applications clearly falls within the "pretrial matters" and "additional duties" clauses. First, the pretrial matters clause excepts eight categories of matters, but not wiretap applications. And the legislative history indicates that Congress intended arrest and search warrants – privacy intrusions as significant as wiretaps and involving similar determinations – to be delegable to magistrates under this clause. App., *infra*, 19a-22a.[2] Second, the residual "additional duties" clause is broad enough to cover Title III

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[2] In addition, the Second Circuit's decision in *United States* v. *Diaz*, 922 F.2d 998 (2d Cir. 1990), cert. denied, 111 S. Ct. 2035 (1991), supported Judge Cardamone's position. The court there held that the empanelment of grand jurors – an act that, like review of a wiretap application, is not directly connected to any particular existing adversary proceeding – falls within the category of "pretrial matters." *Id.* at 1005.

applications and demonstrates Congress's intent that judges experiment with a wide variety of uses of magistrate judges as a means of narrowing the mandatory responsibilities of Article III judges to their core adjudicatory functions. *Id.* at 22a-25a.

REASONS FOR GRANTING THE PETITION

This case presents an issue of exceptional importance to the administration of justice, and worthy of this Court's consideration, for two reasons. First, the Second Circuit's prohibition of Judge Korman's initiative unjustifiably interferes with a legitimate effort to eliminate a burdensome non-adjudicatory function from the heavy judicial workload and unduly constricts judicial delegation powers under the Magistrates Act. Second, the court of appeals employed illegitimate techniques of statutory interpretation – such as using obscure intimations from a statute enacted in 1986 to alter the meaning of one enacted ten years earlier – to achieve this result, in the process substituting its judgment regarding the appropriateness of permitting magistrates to authorize electronic surveillance for the congressional election to commit such decisions to the discretion of the district judges.

A. This Issue Is Of Exceptional Importance Because The Ruling Below Impairs The Power Of District Judges To Utilize An Important Strategy To Relieve The Pressure Of Enormous Caseloads

As the court of appeals itself recognized, this case presents a question of such substantial importance as to justify its consideration of the merits of the government's petition for extraordinary relief, for "'the scope of a Magistrate's authority is a significant issue in federal criminal litigation.'" App., *infra*, 3a (quoting *In re United States*, 903 F.2d 88, 89 (2d Cir. 1990)). The court of appeals' ruling did nothing to diminish the importance of the issue.

Judge Korman's Order responds to a pressing need not only in the Eastern District of New York but throughout the federal court system to free district judges to focus on their ever-increasing load of civil and criminal cases. Yet the Second Circuit, employing dubious techniques of statutory interpretation and relying on an unduly restrictive view of the relevant legislative history, has prohibited district judges from delegating to highly competent magistrate judges the burdensome and time-consuming job of reviewing electronic eavesdropping applications that sometimes run into the hundreds of pages and overseeing any surveillance that is authorized. In an era in which the sheer volume of cases has made it difficult to promptly try civil and criminal cases and reduced the time available for the serious reflection, research and writing that are at the core of the judicial task, a ruling that curtails the power of district judges to delegate such routine matters raises extremely serious questions that deserve the attention of this Court.

Recent statistics on court filings graphically demonstrate the incredible workload under which district judges struggle and underscore the critical importance of allowing them to transfer to magistrates the responsibility for handling non-adjudicatory pretrial matters. Nationwide, the weighted caseload per judge was 416 for the year ended June 30, 1993. In the Eastern District of New York, where Judge Korman sits, the weighted caseload per judge was 571 for that period – seventh highest in the nation. See Administrative Office of the United States Courts, *Magistrate Judge Survey* 1, 3 (December 1993) ("*Magistrate Judge Survey*").[3] District judges nationwide held an average of 398 pending cases on their dockets at the end of June 1993, and judges in the

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[3] "Weighted" caseload takes into account additional factors that complicate a case, such as the number of criminal defendants. See *Magistrate Judge Survey* 3 n.2. The weighted caseload statistic reflects an average of cases filed during the fiscal year.

Eastern District averaged 637 pending cases – sixth highest in the country. *Id.* at 3. Although new civil filings decreased slightly nationwide between 1988 and 1991, they rebounded dramatically in 1992, increasing by 20,000 over the previous year. See Administrative Office of the United States Courts, *Annual Report of the Director* 4 (1992).[4] In many districts, new civil filings increased more than 20% between 1991 and 1992. Criminal cases continued the steady increase begun in 1981, leaving district judges with an average of 68 pending criminal cases each at the end of fiscal 1992, as compared to 50 each at the end of fiscal 1988. *Id.* at 6.

The problem of managing the rising federal caseload cannot satisfactorily be solved simply by adding new judges. To begin with, keeping authorized positions filled has not proven so easy. Of the 649 authorized district judgeships, 85 presently are vacant. In Judge Korman's district, three judgeships currently are unfilled. Perhaps more important, creating new judgeships is not a panacea; the Judicial Conference has consistently favored measured, incremental increases in the size of the federal judiciary. See Judicial Conference of the United States, *Preliminary Report on Judicial Conference Actions* 6 (Sept. 20, 1993); *Report of the Judicial Conference Committee on Long Range Planning* 6 (Sept. 1993); *Report of the Proceedings of the Judicial Conference of the United States* 93 (Sept. 1990). And, while proposals abound for restricting federal jurisdiction as a strategy for relieving the crisis, Congress shows few signs of scaling back the various statutes that help fuel the federal litigation explosion.

With the steady rise in caseloads, district judges have increasingly turned to magistrate judges to handle a wide variety of pretrial and other routine matters. In recent years,

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[4] Fiscal year 1992 is the last year for which complete nationwide statistics are available.

district judges have delegated responsibility for such functions as overseeing grand jury selection,[5] taking guilty pleas with the defendant's consent,[6] presiding over voir dire in felony cases with the defendant's consent,[7] determining whether parties and attorneys should be sanctioned,[8] conducting hearings for preliminary injunctive relief,[9] conducting extradition hearings,[10] reading the jury an *Allen* charge,[11] and ruling on motions to amend a complaint,[12] disqualify counsel,[13] or intervene.[14] These innovative uses of magis-

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[5] *United States* v. *Diaz*, 922 F.2d 998 (2d Cir. 1990), cert. denied, 111 S. Ct. 2035 (1991).

[6] *United States* v. *Williams*, ___ F.3d ___, No. 93-1224 (2d Cir. April 26, 1994).

[7] See *Peretz* v. *United States*, 111 S. Ct. 2661 (1991) (holding this practice consistent with the "additional duties" clause of the 1976 amendments).

[8] District courts have referred motions for discovery sanctions, see, *e.g.*, *Ocelot Oil Corp.* v. *Sparrow Indus.*, 847 F.2d 1458 (10th Cir. 1988), and Rule 11 sanctions, see, *e.g.*, *Maisonville* v. *F2 America, Inc.*, 902 F.2d 746 (9th Cir. 1990), cert. denied, 498 U.S. 1025 (1991).

[9] *Jeffrey S. by Ernest S.* v. *State Board of Educ.*, 896 F.2d 507 (11th Cir. 1990).

[10] *Austin* v. *Healey*, 5 F.3d 598 (2d Cir. 1993).

[11] *United States* v. *Sawyers*, 902 F.2d 1217 (6th Cir. 1990), cert. denied, 111 S. Ct. 2895 (1991).

[12] *Pagano* v. *Frank*, 983 F.2d 343 (1st Cir. 1993).

[13] *Affeldt* v. *Carr*, 628 F. Supp. 1097 (N.D. Ohio 1985).

[14] *Granato* v. *Sunn*, 594 F. Supp. 410 (D. Haw. 1984).

trate judges free district judges to devote more attention to the tasks that are essential to moving their overflowing dockets – handling trials, reviewing and deciding dispositive motions, presiding over pretrial and settlement conferences, and the like.

This Court frequently has recognized the role of magistrate judges in relieving district judges of less important responsibilities and keeping the dockets moving. See *Peretz* v. *United States*, 111 S. Ct. 2661, 2665 (1991) ("Congress intended magistrates to play an integral and important role in the federal judicial system"); *McCarthy* v. *Bronson*, 500 U.S. 136, 142 (1991) ("The central purpose of the 1976 amendment to the Magistrate's Act was to authorize greater use of magistrates to assist federal judges 'in handling an ever-increasing caseload.'") (quoting S. Rep. No. 94-625, 94th Cong., 2d Sess. 2 (1976)). Delegating review of Title III applications is consistent with the many other management strategies judges have employed to reallocate the judicial workload, because it relieves the district judge of a task for which magistrate judges are equally well (if not better) suited by training and experience.

The Title III authorization and oversight function is undeniably important, but it is one that may safely be placed in the competent hands of a federal magistrate judge. Put bluntly, it is a waste of time for federal judges, who by law are the only judicial officers empowered to perform the central tasks of the adjudicatory process,[15] to expend their

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[15] The Magistrates Act affirmatively prohibits magistrate judges from hearing and determining certain dispositive motions, such as motions for injunctive relief, motions for summary judgment, and motions to dismiss for failure to state a claim. 28 U.S.C. § 636(b)(1)(A). And the Court has observed that "the carefully defined grant [to magistrates] of authority to conduct trials of civil matters and of minor criminal cases should be construed as an implicit withholding of the authority to preside at a felony trial."

time reviewing long and complicated applications for electronic eavesdropping orders, monitoring the progress of the surveillance, and reviewing applications for renewal. These tasks, moreover, are closely akin to the determinations of probable cause or appropriate scope of search that are part of the everyday responsibilities of magistrate judges in passing upon applications for conventional search warrants.

Furthermore, the concerns that caused Congress in 1968 to restrict to judges the power to pass upon Title III applications have long since been eliminated. The standards that govern the office of magistrate judge and the system of selection and retention ensures that the persons who fill the position possess qualifications and abilities akin to Article III judges. Unlike the former U.S. Commissioners, magistrate judges are appointed by a majority of the district judges in a district for a term of eight years, and may be removed only for cause. 28 U.S.C. §§ 631(e), (i). They must be attorneys and may not hold any other office during their tenure. *Id.*, §§ 631(b)(1), (c). Congress required that the Judicial Conference of the United States establish standards for selection, including the establishment of merit selection panels to assist in identifying the best qualified persons. *Id.*, §

Gomez v. *United States*, 490 U.S. 858, 872 (1989). Thus, most important adjudicatory functions *must* be performed by Article III judges. Furthermore, although magistrate judges may preside over minor criminal matters and civil trials, the requirement that the parties give their consent (see 18 U.S.C. § 3401(b); 28 U.S.C. § 636(c)(1)) functions as a practical limitation on their ability to relieve district judges of these tasks. In addition, the Court has made clear that judicial tasks that are not specified in the statute, but that are not like the "subsidiary matters" magistrates may perform over the parties' objections, also require the parties' consent before a magistrate may preside. See *Gomez*, 490 U.S. at 860, 872 (magistrate may conduct voir dire in felony case only if defendant consents).

631(b)(5). Those standards provide that magistrate judges must be selected from among nominees found by the merit selection panels to "possess the same types of personal and professional qualities expected of district judges." Administrative Office of the United States Courts, *The Selection and Appointment of United States Magistrates* 10, 12-13 (1987).

This Court has observed that in the years since Congress created the new office of magistrate, the responsibilities of magistrates have steadily expanded while Congressional concern over their abilities has diminished. See *Gomez* v. *United States*, 490 U.S. 858, 865-871 (1989). As Judges Korman and Cardamone pointed out, there is no sound reason why judicial officers who are entrusted to issue warrants empowering government officials to conduct arrests, searches and seizures would not be sensitive to the privacy concerns that are implicated by electronic surveillance. The "neutral and detached" judgment on the issue of probable cause that provides the necessary Constitutional safeguard prior to the authorization of electronic surveillance, *United States* v. *United States District Court*, 407 U.S. 297, 316-317 (1972), plainly can be exercised by magistrate judges.

The Second Circuit's opinion is likely to chill the very experimentation with the use of magistrate judges that Congress envisioned when it expanded magistrates' roles in 1976. Its decision blocking delegation of Title III authorization and oversight functions raises questions that demand further review.

B. The Use Of The 1986 Privacy Act To Alter The Meaning Of The 1976 Magistrates Act Amendments Conflicts With Accepted Principles Of Statutory Construction

Because Judge Korman's thorough opinion explains why the 1976 amendments to the Magistrates Act authorizes magistrate judges to pass upon Title III wiretap applications (see App., *infra*, 31a-43a), we will not repeat those points

here. We will, however, briefly demonstrate why the Second Circuit's reliance on the Electronic Communications Privacy Act of 1986, Pub. L. No. 99-508, 100 Stat. 1848 ("Privacy Act") to establish the illegality of delegating Title III wiretap review was a misguided statutory analysis with potentially far-reaching consequences for future statutory interpretation cases.

In the Privacy Act, Congress took action to regulate law enforcement use of pen registers and trap-and-trace devices, requiring that, before such telephone monitoring devices could be used, permission be obtained from a "court of competent jurisdiction," which it defined to include magistrates. 18 U.S.C. § 3122(a). The panel majority placed great – and, we respectfully submit, illegitimate – weight on the fact that the Privacy Act did not simultaneously specify that eavesdropping applications under Title III (a subject with which the legislation was not concerned) could also be authorized by magistrates. This omission demonstrated to the panel majority that Congress understood that function to be performable only by Article III judges and intended to continue that limitation in force. App., *infra*, 11a.

This use of the 1986 Privacy Act to define the relationship between Title III and the 1976 amendments to the Magistrates Act conflicts with established principles of statutory construction. This Court has demanded the greatest caution in using subsequent legislative materials to interpret earlier statutes. See *Russello* v. *United States*, 464 U.S. 16, 26 (1983); *United States* v. *Price*, 361 U.S. 304, 313 (1960). The panel ignored this well-known canon of construction when it relied on Congress's failure in the Privacy Act to alter Title III's list of judicial officers authorized to review wiretap applications. But as Judge Cardamone pointed out (App., *infra*, 26a), what Congress did *not* do when amending Title III in 1986 is hardly a basis for divining the intent of earlier legislation allocating authority between district judges and magistrate judges. Indeed Congress, which was not

otherwise amending the wiretap provisions of Title III in 1986, had no need to add magistrate judges to the list of officials empowered to review wiretap applications because it had already done so by the "notwithstanding" clause of the Magistrates Act.[16]

In demanding specific Congressional authorization for magistrate judges to review wiretap applications, the panel elevated ill-defined "privacy" concerns implicated by Title III over statutory language and legislative history that unambiguously permits a delegating judge to ignore the literal meaning of the terms "court" or "judge" in prior grants of authority. In effect, the panel decided that it need not take seriously the "notwithstanding" clause if it found reasons why a task originally delegated to an Article III judge should remain with that judicial officer. In so doing, it arrogated to itself the power to decide what delegations to magistrate judges are

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[16] The panel's heavy reliance on *United States* v. *Giordano*, 426 U.S. 505 (1974), is similarly inappropriate, as well as unconvincing. In *Giordano*, the Court held that, despite a statute (28 U.S.C. § 510) that generally authorized the Attorney General to delegate functions to other officials, Title III's specification of the Justice Department officials who could authorize wiretap applications precluded a delegation to the Attorney General's Executive Assistant. 426 U.S. at 513. But *Giordano* is different from this case in a critical respect: although the Attorney General's delegation power was analogous to the power of district judges to delegate under the Magistrates Act, it *predated* Title III's specific enumeration of the persons to whom the Attorney General could delegate the power to seek wiretap authorizations. Here, by contrast, the broad delegation power of the Magistrates Act *postdates* Title III's specific reference to district judges and *expressly* nullifies that limitation by the "notwithstanding" clause. As Judge Cardamone pointed out (App., *infra*, 27a), the court of appeals majority simply ignored the intent of Congress in including a broad "pretrial matters" clause in the 1976 amendments.

appropriate, thereby overriding the congressional assignment of such powers to the district judges.

Apart from the methodological impropriety of the majority's use of the 1986 Privacy Act, the inference it draws from that legislation is entirely unfounded. As Judge Cardamone cogently explained in his dissent (App., *infra*, 27a), while Congress in 1976 quite clearly contemplated that the "notwithstanding" clause would authorize magistrates to perform functions that then-existing statutes limited to judges, it was not necessarily writing a blank check with respect to later-enacted statutes that might contain similar limitations. Thus, a later Congress could neither rely on the "notwithstanding" clause nor simply incorporate the definition in Section 2510(9) if it wished to make clear that the functions it was addressing in 1986 could be performed by magistrate judges. Rather, it would have to delineate explicitly the judicial officers it was empowering to perform the task. The inclusion of magistrate judges in the 1986 Act's definition of "court of competent jurisdiction," which merely made clear Congress' intent to allow magistrate judges to review pen register applications, therefore affords no hint as to the meaning of the 1976 legislation or its effect on the wiretap portion of Title III.

In sum, the panel majority's crabbed reading of the "notwithstanding" clause represents a troublesome and unjustified use of post-enactment legislative actions to alter the otherwise clear meaning of earlier legislation, and it stands as precedent for ignoring the "notwithstanding" language altogether if a court finds countervailing interests that require the attention of an Article III judge. This decision deserves further review, especially in light of the importance of the issue presented in this case to the administration of justice in the federal courts.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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